

**UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

**OAKWOOD HERITAGE HOSPITAL, )  
Employer, )**

**VS. )**

**INTERNATIONAL UNION, UNITED )  
AUTOMOBILE, AEROSPACE & )  
AGRICULTURAL IMPLEMENT )  
WORKERS OF AMERICA (UAW), )  
Petitioner. )**

**CASE NO. 7-RC-22141**

**BRIEF OF AMICI CURIAE, MARINER HEALTH CARE  
MANAGEMENT COMPANY, EXTENDICARE HEALTH SERVICES, INC.,  
AND KINDRED HEALTHCARE OPERATING, INC.**

**Submitted by:**

**David W. Miller  
Todd M. Nierman  
BAKER & DANIELS  
Suite 2700  
300 North Meridian Street  
Indianapolis, IN 46204  
Telephone No.: 317-237-0300**

## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iii
STATEMENT OF INTEREST.....	1
QUESTIONS PRESENTED BY THE BOARD .....	3
I. SUMMARY OF ARGUMENT.....	4
II. ARGUMENT .....	7
1. What is the meaning of the term "independent judgment" as used in Section 2(11) of the Act? .....	7
2. What is the difference, if any, between the terms "assign" and "direct" as used in Section 2(11) of the Act?.....	14
3. What is the meaning of the word "responsibly" in the statutory phrase "responsibly to direct"?.....	14
4. What is the distinction between directing "the manner of others performance of discrete tasks" and directing "other employees"?.....	15
5. Is there tension between the Act's coverage of professional employees and its exclusion of supervisors, and, if so, how should that tension be resolved? .....	16
6. What are the appropriate guidelines for determining the status of a person who supervises on some days, and works as a non-supervisory employee on other days? .....	17
7. What, if any, difference does it make that persons in a classification rotate into and out of supervisory positions, such that some or all persons in the classification will spend some time supervising? .....	17
8. To what extent, if any, may the Board interpret the statute to take into account more recent developments in management, such as giving rank and file employees greater autonomy and using self-regulating work teams? .....	18

9. What functions or authority could distinguish between "straw bosses, lead men, set-up men, and other minor supervisory employees," Congress intended to include within the Act's protections, and "the supervisor vested with genuine management prerogatives"? .....19
10. To what extent, if at all, should the Board consider secondary indicia – for example, the ratio of alleged supervisors to unit employees or the amount of time spent by the alleged supervisors performing unit work – in determining supervisory status? .....19

III. CONCLUSION .....20

APPENDIX

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page</b>
<u>Aladdin Hotel</u> , 270 NLRB 838 (1984) .....	18
<u>Arizona Public Serv. Co. V. NLRB</u> , 453 F.2d 228 (9 <sup>th</sup> Cir. 1971).....	17
<u>Atlanta Newspaper</u> , 306 NLRB 751 (1992) .....	15
<u>Avon Convalescent Ctr., Inc.</u> , 200 NLRB 702 (1972).....	10
<u>Beverly Calif. Corp. v. NLRB</u> , 970 F.2d 1548 (6 <sup>th</sup> Cir. 1992) .....	7
<u>Beverly Enters., Va., Inc. v. NLRB</u> , 165 F.3d 290 (4 <sup>th</sup> Cir. 1999) .....	5, 7, 10
<u>Beverly Health &amp; Rehab. Servs. v. NLRB</u> , 1999 WL 282695 (unpublished) (6 <sup>th</sup> Cir. 1999).....	15
<u>Billows Elec. Supply</u> , 311 NLRB 878 (1993) .....	18
<u>Bozeman Deaconess Found.</u> , 322 NLRB 196 (1997).....	6, 7
<u>Caremore, Inc. v. NLRB</u> , 129 F.3d 365 (6 <sup>th</sup> Cir. 1997).....	passim
<u>Children's Farm Home</u> , 324 NLRB 61 (1997).....	15
<u>Commercial Fleet Wash</u> , 190 NLRB 326 (1971) .....	18
<u>E&amp;L Transp. Co. v. NLRB</u> , 85 F.3d 1258 (7 <sup>th</sup> Cir. 1996).....	17
<u>Glenmark Assocs., Inc. v. NLRB</u> , 147 F.3d 333 (4 <sup>th</sup> Cir. 1997) .....	passim
<u>GranCare Inc. v. NLRB</u> , 137 F.3d 372 (6 <sup>th</sup> Cir. 1998) .....	9, 20
<u>Health Care &amp; Retirement Corp. v. NLRB</u> , 987 F.2d 1256 (6 <sup>th</sup> Cir. 1993).....	6, 10
<u>Integrated Health Servs. v. NLRB</u> , 191 F.3d 703 (6 <sup>th</sup> Cir. 1999) .....	9
<u>Mid-America Care Found. d/b/a Fair Oaks Healthcare Ctr v. NLRB</u> , 148 F.3d 638 (6 <sup>th</sup> Cir. 1998) .....	7, 8
<u>Millard Refrigerated Servs.</u> , 326 NLRB 1437 (1998) .....	15
<u>Mississippi Power &amp; Light Co.</u> , 328 NLRB 965 (1999) .....	passim
<u>NLRB v. Beacon Light Christian Nursing Home</u> , 825 F.2d 1076 (6 <sup>th</sup> Cir. 1987).....	7

<u>NLRB v. Detroit Edison Co.</u> , 537 F.2d 239 (6 <sup>th</sup> Cir. 1976).....	8
<u>NLRB v. Health Care &amp; Retirement Corp.</u> , 511 U.S. 571 (1994).....	6
<u>NLRB v. Kentucky River Cmty. Care</u> , 532 U.S. 706 (2001) .....	7, 9
<u>NLRB v. Porta Sys.</u> , 625 F.2d 394 (2 <sup>nd</sup> Cir. 1980).....	5
<u>NLRB v. Quinnipiac College</u> , 256 F.3d 68 (2 <sup>nd</sup> Cir. 2001).....	8
<u>NLRB v. Winnebago Television Corp.</u> , 75 F.3d 1208 (7 <sup>th</sup> Cir., 1996) .....	5
<u>Pine Brook Care Ctr., Inc.</u> , 322 NLRB 130 (1996) .....	6
<u>Providence Hosp. v. NLRB</u> , 121 F.3d 548 (9 <sup>th</sup> Cir. 1997) .....	13
<u>Providence Hosp.</u> , 320 NLRB 717 (1996).....	6, 16
<u>Rockville Nursing Ctr.</u> , 193 NLRB 959 (1971).....	10
<u>Sherwood Corp.</u> , 320 NLRB 68 (1996).....	6
<u>Spentonbush/Red Star Cos. v. NLRB</u> , 106 F.3d 484 (2 <sup>nd</sup> Cir. 1997) .....	5, 7
<u>Ten Broeck Commons</u> , 320 NLRB 806 (1996) .....	6, 13
<u>U.S. Radium Corp.</u> , 122 NLRB 468 (1958) .....	18
<u>Washington Nursing Home, Inc.</u> , 321 NLRB 48 (1996) .....	6
<u>Westinghouse Elec. Corp. v. NLRB</u> , 424 F.2d 1151 (7 <sup>th</sup> Cir. 1970).....	17
<b>Other Authorities</b>	
<u>Cong. Rec., S.</u> , May 7, 1947 .....	11

**UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

**OAKWOOD HERITAGE HOSPITAL, )  
Employer, )**

**VS. )**

**CASE NO. 7-RC-22141**

**INTERNATIONAL UNION, UNITED )  
AUTOMOBILE, AEROSPACE & )  
AGRICULTURAL IMPLEMENT )  
WORKERS OF AMERICA (UAW), )  
Petitioner. )**

**STATEMENT OF INTEREST**

The supervisory status of nurses in long term care facilities has been hotly contested before the National Labor Relations Board ("Board" and "NLRB") and federal courts for over 20 years. Extendicare Health Services, Inc. ("Extendicare"), Mariner Health Care Management Company ("Mariner"), and Kindred Healthcare Operating, Inc. ("Kindred") (together the "Operators"), jointly submit this Brief.

Extendicare operates nearly 200 long term care facilities, employing over 20,000 employees. Kindred operates more than 250 long term care facilities, employing over 30,000 employees. Mariner operates nearly 300 long term care facilities, employing over 30,000 employees. As three of the nation's five largest long-term nursing care operators, together employing over 80,000 employees in almost every state, the Operators have a unique and strong interest in the National Labor Relations Board's application of the definition of "supervisor" under Section 2(11) of the Act.

It is the Operators' position that charge nurses in a long-term care facility regularly assign and responsibly direct the work of nursing assistants using independent judgment. They are supervisors within the meaning of the Act.

### **QUESTIONS PRESENTED BY THE BOARD**

1. What is the meaning of the term "independent judgment" as used in Section 2(11) of the Act?
2. What is the difference, if any, between the terms "assign" and "direct" as used in Section 2(11) of the Act?
3. What is the meaning of the word "responsibly" in the statutory phrase "responsibly to direct"?
4. What is the distinction between directing "the manner of others performance of discrete tasks" and directing "other employees"?
5. Is there tension between the Act's coverage of professional employees and its exclusion of supervisors, and, if so, how should that tension be resolved?
6. What are the appropriate guidelines for determining the status of a person who supervises on some days, and works as a non-supervisory employee on other days?
7. What, if any, difference does it make that persons in a classification rotate into and out of supervisory positions, such that some or all persons in the classification will spend some time supervising?
8. To what extent, if any, may the Board interpret the statute to take into account more recent developments in management, such as giving rank and file employees greater autonomy and using self-regulating work teams?
9. What functions or authority could distinguish between "straw bosses, lead men, set-up men, and other minor supervisory employees," Congress intended to include within the Act's protections, and "the supervisor vested with genuine management prerogatives"?
10. To what extent, if at all, should the Board consider secondary indicia – for example, the ratio of alleged supervisors to unit employees or the amount of time spent by the alleged supervisors performing unit work – in determining supervisory status?



## **I. SUMMARY OF ARGUMENT**

Residents in a long term care facility differ in their health care needs, personalities, and preferences. No two residents are the same, and any given resident's needs change daily. Likewise, all nursing assistants in a long term care facility are not the same in terms of their experience, skill levels, physical abilities, personalities, and behavior.

It is the charge nurse who must match residents and nursing assistants. A nurse gives the nursing assistants assigned to her their daily assignments concerning patient care and non-patient care duties. She considers the needs of the residents, the experience, skills and abilities of the nursing assistants, and the residents' and nursing assistants' preferences and personalities. She must determine how many and which residents to assign to each nursing assistant. She does so without detailed employer guidelines or policies that circumscribe her judgment.

During the course of her shift, the nurse makes rounds, checking the condition of the residents, and monitoring the work of the nursing assistants. She is responsible, and is held accountable, for making sure the nursing assistants perform their work timely and correctly. As she observes and reassesses residents and nursing assistants' performance, she implements changes to the care instructions and assignments on an ongoing basis. She does so taking into account the needs of the residents, the preferences of the residents and employees, and the experience and skill levels of the nursing assistants assigned to her.

The nurse's job is by no means routine. A nurse in a long term care facility is taking care of human beings, not robots. She continually exercises independent judgment as she assigns and responsibly directs the work of the nursing assistants assigned to her.

The Board has a long history of inconsistently applying the statutory definition of a "supervisor" found in Section 2(11) of the Act, particularly in the context of nurses. See, e.g., NLRB v. North Ark. Elec. Co-op., 412 F.2d 324, 328 (8<sup>th</sup> Cir. 1969) (court accuses Board of using different analysis in unfair labor practice cases than in bargaining unit cases); NLRB v. Porta Sys., 625 F.2d 394, 405-07 (2<sup>nd</sup> Cir. 1980). That inconsistency has led several Courts of Appeal to question the deference to which the Board continues to be entitled. See, e.g., Beverly Enters., Va., Inc. v. NLRB, 165 F.3d 290, 295 (4<sup>th</sup> Cir. 1999) ("The Board has, we believe, manifested an irrational inconsistency"); Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484 (2<sup>nd</sup> Cir. 1997) ("The Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions."); Glenmark Assocs., Inc. v. NLRB, 147 F.3d 333 (4<sup>th</sup> Cir. 1997) ("The Board should reconsider its single-minded pursuit of its policy goals without regard for the supervisory role of the [courts]."); NLRB v. Winnebago Television Corp., 75 F.3d 1208, 1214 (7<sup>th</sup> Cir., 1996) ("The NLRB's manipulation of the definition provided in [Section 2(11)] has earned it little deference"); Caremore, Inc. v. NLRB, 129 F.3d 365 (6<sup>th</sup> Cir. 1997) ("The NLRB continues to misapprehend both the law and its own place in the legal system.").

The two resounding messages of these many court decisions are that the Board should: (1) respect, and refrain from attempts to modify, the plain language of the statute; and (2) yield to the decisions of the reviewing courts: See Mississippi Power & Light Co., 328 NLRB 965, 981, n.25 (1999) (Brame dissenting). These are the fundamental answers to each of the questions the Board poses.

Consistency and predictability, based on sound statutory analysis and established court precedent, are worthy goals. The fact the Board has asked for amicus briefs on its

questions sends a positive signal to employers that the Board intends to strive for these goals.

But, employers have been down this road before, and have found no relief in the Board's decisions.

In 1994, in the wake of NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994), the Board heard oral argument in Providence Hosp., 320 NLRB 717 (1996); and Ten Broeck Commons, 320 NLRB 806 (1996), and asked for amicus briefs addressing "how the Board should interpret 'assign,' 'responsibly to direct,' 'routine,' and 'independent judgment,' and how it should harmonize the provisions of Sections 2(11) and (12)." A number of amici filed briefs. See Providence Hosp., *supra*, at n.1. The Board pretended to listen.

In Providence Hosp. and Ten Broeck Commons, the Board announced it was going to apply its "traditional analysis" for determining the supervisory status of employees in other industries. It did not. In its cases leading up to the Supreme Court's decision in Kentucky River, the Board continued to manipulate the statutory language to enable it to categorize nurses as employees, not supervisors. Sherwood Corp., 320 NLRB 68 (1996); Caremore, Inc., 321 NLRB 120 (1996); Bozeman Deaconess Found., 322 NLRB 196 (1997); Pine Brook Care Ctr., Inc., 322 NLRB 130 (1996); Washington Nursing Home, Inc., 321 NLRB 48 (1996).

In the wake of Kentucky River, the Board once again reaches out to amici for advice on the same issues it presented in Providence Hosp., and Ten Broeck Commons. This time, the Board must act within the bounds of the law. The Board should use a traditional analysis of the plain statutory language, regardless of industry, and follow the case law of the Courts of Appeal, for "it is the courts, and not the Board, who bear the final responsibility for interpreting the law. Health Care & Retirement Corp. v. NLRB, 987 F.2d 1256, 1260 (6<sup>th</sup> Cir. 1993). If it does so, the answers to the Board's questions are not hard to find. These issues have

already been decided as a matter of law. Beverly Enters., Va., Inc., supra; Integrated Health Servs. of Mich. v. NLRB, 191 F.3d 703 (6<sup>th</sup> Cir. 1999); GranCare, Inc. v. NLRB, 137 F.3d 372 (6<sup>th</sup> Cir. 1998); Glenmark Assocs., Inc., supra; Mid-America Care Found. d/b/a Fair Oaks Healthcare Ctr v. NLRB, 148 F.3d 638 (6<sup>th</sup> Cir. 1998); Spentonbush/Red Star Cos. v. NLRB, supra; Caremore, Inc. v. NLRB, supra; Beverly Calif. Corp. v. NLRB, 970 F.2d 1548 (6<sup>th</sup> Cir. 1992); NLRB v. Beacon Light Christian Nursing Home, 825 F.2d 1076 (6<sup>th</sup> Cir. 1987). The Board should yield to these consistent, and well-reasoned, decisions.

With spiraling costs, decreasing reimbursements, and shrinking profit margins, long term care providers cannot afford to continue to expend valuable resources on appeals of Regional Director and Board decisions in supervisor cases. If the Board, once again, pays only lip service to the statutory language and court precedent, this vicious cycle will continue unabated.

## **II. ARGUMENT**

### **1. What is the meaning of the term "independent judgment" as used in Section 2(11) of the Act?**

In NLRB v. Kentucky River Cmty. Care, 532 U.S. 706 (2001), the Court allowed that "the statutory term 'independent judgment' is ambiguous with respect to the degree (not what kind) of discretion required for supervisory status." The Court stated that the Board may determine, within reason, what degree of discretion is required; and that detailed employer-promulgated orders and regulations are relevant to determining the degree of discretion actually exercised in a particular case.

As the Supreme Court notes, there are degrees of judgment contemplated by the Act. The Act distinguishes between judgment which is "routine" and judgment which is "independent". Routine judgment is formulaic; there is little, if any, room for discretion. If a

decision is based on reference to detailed employer promulgated guidelines (written or otherwise), it is likely that only routine judgment is being exercised. In such a case, the course of action is prescribed by the employer, and the individual reacts reflexively. There simply is no subjective decision making. If *all* of an individual's decisions are so controlled, the individual is not a supervisor.

In contrast, where the individual depends on his or her own authorities and thought processes to weigh, analyze, and choose among alternative courses of action, the individual is exercising independent judgment. The fact that the thought process is based on the individual's skill, training, and experience, does not negate the individual's supervisory status. In such a case, employer guidelines may inform the individual's decision-making, but all of the decisions are not controlled by the guidelines. Importantly, only *some portion* of an individual's decisions must fall in the independent judgment category for the individual to be a supervisor. Mid-America Care, 148 F.3d at 643 (an employer must only demonstrate that some portion of the individual's authority is free from strict regulation).

Thus, even where an employer maintains detailed guidelines, independent judgments can still be exercised. "The existence of governing policies and procedures and the exercise of independent judgment are not mutually exclusive." NLRB v. Quinnipiac College, 256 F.3d 68, 74 (2<sup>nd</sup> Cir. 2001); NLRB v. Detroit Edison Co., 537 F.2d 239 (6<sup>th</sup> Cir. 1976). In many industries, like long term care, detailed guidelines cannot cover every possible situation. Likewise, an individual is a supervisor where he or she is not prevented from departing from written instructions if another course of action is more advantageous. See Mississippi Power & Light Co., 328 NLRB 965, 977 (1999) (Hurtgen and Brame dissenting).

Once it is determined that an individual exercises independent, as opposed to routine, judgment, analysis of the degree of discretion ends. The Act does not create degrees of independent judgment, nor does it require that independent judgment be exercised all the time or impact matters of substantial importance or significance. This is not to say that the frequency of exercise, or the severity of the impact of faulty decision-making, may not be relevant to determining whether independent judgment is exercised in the first place. But the issue before the Board is not the consequence of the judgment, it is whether there is independent judgment for the individual to exercise. As Members Hurtgen and Brame note in their dissent in Mississippi

Power:

Concededly, there may be cases where an individual must take a rigidly prescribed course of action (e.g., throw a lever) and, if he/she fails to do that, a terrible consequence will occur. We would agree that such an individual, acting without discretion, is not a supervisor.

328 NLRB at 980

In the nursing home context, it is well-established that charge nurses exercise independent, not routine, judgment when they assign and direct work. Appellate courts have repeatedly and adamantly held that there is nothing "routine" about a nurse's assignment and direction of work done by nursing assistants in a long-term care facility, and that, as a matter of law, nurses exercise independent judgment. Kentucky River, 532 U.S. at 710; Integrated Health Servs. v. NLRB, 191 F.3d 703, 711 (6<sup>th</sup> Cir. 1999) (it is "perfectly obvious that the kind of judgment exercised by registered nurses directing nurse's aides in the care of patients occupying skilled and intermediate care beds in a nursing home is not 'merely routine'"); GranCare Inc. v. NLRB, 137 F.3d 372, 375-76 (6<sup>th</sup> Cir. 1998); Caremore, Inc. v. NLRB, 129 F.3d 365, 369 (6<sup>th</sup> Cir. 1997); Glenmark Assocs. v. NLRB, 147 F.3d 333 (4<sup>th</sup> Cir. 1997). ("Decisions to assign

work are inseverable from the exercise of independent judgment, especially in the health care context where staffing decisions can have such an impact on health and well being."); Health Care & Retirement, 987 F.2d at 1261 (job duties of LPN's require the use of independent judgment).

The Board, itself, has recognized that charge nurses exercise independent judgment. In NLRB v. Health Care & Retirement, the Board did not argue that the nurses lacked independent judgment. And in the context of its Section 8(a)(1) and Section 8(a)(3) cases, the Board has stated:

In a nursing home servicing elderly and sick patients whose critical needs may momentarily require variations in standard procedures, the nurse responsible for the supervision of other nurses or a shift or a section must obviously be prepared to exercise her discretion in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely. Furthermore, power to enforce important personnel policies, rules, and regulations is certain to require the exercise of independent judgment.

Avon Convalescent Ctr., Inc., 200 NLRB 702 (1972); Rockville Nursing Ctr., 193 NLRB 959 (1971).

As Member Brame notes in his Mississippi Power dissent and as the Fourth Circuit clearly stated in Glenmark Associates, *supra*, "The Board should refrain from attempts to modify the plain language of the statute and should respect the decisions of reviewing courts". See Mississippi Power & Light Co., 328 NLRB at 981. In the nursing home context, the question whether nurses exercise independent judgment has been decided. There simply is no issue. Beverly Enters., Va., Inc. v. NLRB, 165 F.3d 290, 295 (4<sup>th</sup> Cir. 1999) ("In applying the definition of supervisor . . . the Board has, we believe, manifested an irrational inconsistency.");

Caremore, Inc. v. NLRB, 129 F.3d at 371 (inviting employer to petition for fees because "the NLRB continues to misapprehend both the law and its own place in the legal system.").

Attached as an Appendix to this Amici Brief are the Affidavits of Mary Lou Rippin, Kathy Kenser and Arlene Gallo.<sup>1</sup> Each is a Director of Nurses at a facility operated by one of the largest long-term care operators in the country. Each has been a DON for many years, and has performed DON services in numerous facilities. The Affidavits, and the record in Golden Crest, fully support the conclusion that nurses in a long term care facility exercise independent judgment when they assign and responsibly direct work.

Residents in a long-term care facility differ in their health care needs, acuity levels, personalities, and mental awareness. No two residents are exactly the same, and any given resident's needs and acuity level can vary on a day to day, if not hourly, basis. Likewise, all nursing assistants in a long-term care facility are not the same in terms of their experience, skill level, physical abilities, personalities, and behaviors.

The long term care industry is facing, and it has for a long time faced, short staffing and high turnover. As a result, on any given day, there is likely to be a newly hired nursing assistant being integrated into the work force. Staffing on a particular shift or floor in a long-term care facility is not the same day in and day out. Due to absences and new hires, staffing changes regularly.

It is up to the nurse to integrate nursing assistants into the mix. Among other duties, a charge nurse in a long-term care facility gives the nursing assistants assigned to her their daily assignments concerning patient care and non-patient care duties. In order to do so,

---

<sup>1</sup> The Affidavits are captioned, and were filed, in Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Health Care Center, 18-RC-16415 and 18-RC-16416.



she checks her staffing to see which nursing assistants are assigned to her area, and which ones have reported to work. In making initial assignments, the nurse considers the needs of the residents, the experience, skills and abilities of the nursing assistants, and the resident and nursing assistant preferences and personalities. She must determine how many and which residents to assign to each nursing assistant. The fact the facility may establish or work within staffing ratios or guidelines does not circumscribe the nurse's judgment. Glenmark Assocs., 147 F.3d at 341-42.

During the course of her shift, the nurse makes rounds, checking residents' conditions and monitoring the work of the nursing assistants. The nurse is responsible and is held accountable for making sure the nursing assistants perform their work timely and correctly and that the work is documented properly for reimbursement purposes. She has the authority to reassign and redirect nursing assistants when she sees work that needs to be performed or redone. She counsels nursing assistants and trains them in the proper methods to perform work. The nurses are making a continual assessment of the residents' needs and the progress of the nursing assistants. They must understand the relative importance of the nursing assistants' tasks so they can properly determine which duties can be ignored when emergencies arise within a facility, and so they can prioritize duties.

Because residents' needs change on a regular basis, while the nurse is observing and reassessing residents, she implements changes to the care instructions and assignments on an on-going basis. When doing so, she takes into account the needs of the residents, the acuity level of the residents, the preferences of the residents and employees, the experience and skill level of the nursing assistants, the physical limitations of the nursing assistants, and the personalities of the individuals involved.

It is absurd for the Board (as it often has) or a regional director (as is the case in Golden Crest) to state that a nurse's judgment is circumscribed by employer policy. "[A] sick human being is not the same as a building. Of necessity, the plan for the care of the former must be carried out with discretion and judgment. There are subtle nuances in the care of a sick human being, such that a plan cannot be woodenly administered with the precision of a blueprint." Ten Broeck Commons, 320 NLRB at 815 (Cohen dissenting); see also Providence Hosp. v. NLRB, 121 F.3d 548, 556 (9<sup>th</sup> Cir. 1997) ("Anyone who has had the experience of being a patient in a hospital knows that the thoughtful matching of nurse to patient is a high art. The judgment exercised is not, in the language of the statute, 'routine or clerical.'" (Noonan dissenting))

While doctors' orders and patient care plans exist for each resident in a long-term care facility, they do not detail a nursing assistant's duties. There are no employer promulgated guidelines that set forth all of a nursing assistant's tasks. Moreover, residents' care needs change by the day, if not by the hour or minute. Care plans and other guidelines cannot contemplate all such changes. And, each nursing assistant has different skills and abilities. There are no guidelines or plans that take these variations into account. That is the nurse's job.

The nursing assistant receives direction as to changes from the nurse. Care plans do not tell a nurse how many residents to assign to a nursing assistant, to which nursing assistants to assign what work, or how to prioritize nursing assistant duties. It is up to the nurse to constantly assess and observe the residents and the nursing assistants, and to implement changes to the needed care on an ongoing basis. Those changes are reflected in the reassignment and redirection of the nursing assistants in the area. Employer policies, doctors' orders, and care plans do not tell a nurse what, or how, to implement such changes. These are documents

intended to outline a resident's care; they do not, and cannot, constrain a nurse's exercise of her judgment in providing nursing care.

2. **What is the difference, if any, between the terms "assign" and "direct" as used in Section 2(11) of the Act?**

In many respects, the distinction between "assigning" work and "directing" work is temporal. An individual "assigns" an employee to a particular area or group of residents at the beginning of the day or week. An individual also "assigns" the specific activities the individuals are to perform in that area.

The same individual, or someone else, "directs" the ongoing activities previously assigned. In other words, he or she oversees the performance of the work. "Direct" was added to the Act later in the legislative process because of a concern that a front line supervisor may not assign the work to be done, but yet he is charged with seeing that a particular function is accomplished.

3. **What is the meaning of the word "responsibly" in the statutory phrase "responsibly to direct"?**

The meaning of "responsibly" in the statutory phrase "responsibly to direct" means that the individual is charged with getting the particular function done. He is responsible for using his judgment, based on experience, training, and ability, to make sure that the duties someone else assigned to other employees get done by those employees. Mississippi Power, 328 NLRB at 979-80, n.23 (Hurtgen dissenting). He is held responsible and is accountable for the end product. The individual directing the work is deciding what tasks shall be done next, by whom, and how to do them properly. Cong. Rec., S., May 7, 1947.

Relevant, although not dispositive, to the issue of "responsible" direction are the consequences to the individual for failing to exercise or mistakenly exercising judgment. Where

an employer holds an individual accountable for such consequences, clearly the individual is responsibly directing the work of others. See Atlanta Newspaper, 306 NLRB 751, 755 (1992); Children's Farm Home, 324 NLRB 61, 64 (1997); Millard Refrigerated Servs., 326 NLRB 1437 (1998).

In the nursing home context, nurses responsibly direct the work of nursing assistants. See Caremore, Inc., 129 F.3d at 369; see also Beverly Health & Rehab. Servs. v. NLRB, 1999 WL 282695 (unpublished) (6<sup>th</sup> Cir. 1999) (providing direction to staff regarding patient care "constitutes the authority 'responsibly to direct'").

4. **What is the distinction between directing "the manner of others performance of discrete tasks" and directing "other employees"?**

There is a distinction between directing "the manner of others performance of discrete tasks" and directing "other employees". A journeyman, lead man or straw boss may, as an incident to his primary function of doing manual tasks, direct less skilled employees. He directs only the manner of others' performance of discrete tasks. There is no "responsible" direction. He is charged with doing the manual task itself. As an incident to that charge, he gives directives to a helper or other less skilled employees, relating to the performance of the charged task.

In contrast, when someone is "directing other employees" he is charged with seeing that subordinate personnel do their tasks; the individual also having his own tasks to perform. The direction is an important, if not primary function, of the employee's job. It is not incidental to the job.

A nurse does more than direct tasks. She directs employees. She is responsible for the patients on her watch. Based on her assessment of the patients' respective needs, and her knowledge of her nursing assistants' respective skills, as well as other variables, she decides who

will perform that work; explains how to perform it; observes its performance; changes the priorities with which the work is performed; and has the authority to counsel employees who do not carry out her directions. She oversees how the nursing assistants perform their entire job, not only specific tasks. This is responsible direction of other employees.

5. **Is there tension between the Act's coverage of professional employees and its exclusion of supervisors, and, if so, how should that tension be resolved?**

The short answer to Board's question is, no. As Member Cohen stated in Providence Hospital, 320 NLRB 717 (1996), the difference between the Section 2(11) exclusion and the Section 2(12) inclusion is "substantial and real". A supervisor exercises independent judgment with regard to the functions set forth in Section 2(11). He does so vis-à-vis other employees. Section 2(12) speaks to exercising judgment only with respect to the task. In the context of a long-term care facility, the preparation of a patient care plan involves the use of professional judgment. A team of health care professionals devises the plan using their professional judgment solely with respect to the tasks in the plans; they are not assigning or directing specific employees to perform those tasks. When the nurse administers the patient care plan, she must determine which tasks must be done first and by whom. These activities are supervisory responsibilities because they involve judgmental assignment and direction with respect to employees.

Of course, a professional can exercise independent judgment with respect to one of the functions set forth in Section 2(11) while, at the same time, exercising professional judgment. In that case, the professional is a supervisor. If a professional does not exercise independent judgment with respect to one of the functions in Section 2(11), he is not a supervisor. An example in many nursing homes is the social worker, who is involved in developing the patient care plan, but supervises no other employees. There is no "tension."

Thus, if a professional is charged only with doing a task, as opposed to being responsible for seeing that others perform their tasks, then the professional is not responsibly directing work within the meaning of Section 2(11), even if when doing his tasks, he incidentally gives a directive to another worker in a helper role. See Arizona Public Serv. Co. V. NLRB, 453 F.2d 228 (9<sup>th</sup> Cir. 1971); Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151 (7<sup>th</sup> Cir. 1970).

The Board also asks in Question 5 whether the Act contemplates a situation in which an entire group of professional workers may be deemed supervisors, based on their role with respect to less skilled workers? Supervisory status is determined based on an analysis of an individual's duties and responsibilities with respect to the criteria set forth in Section 2(11). If any individual satisfies one or more of those criteria, he or she is a supervisor. The fact that each member of a classification of professional workers may individually satisfy the statutory definition does not negate the fact that they satisfied the definition. Exclusion of all nurses in a long-term care facility is no different than excluding all foremen in a manufacturing plant. If the foremen have the authority to responsibility direct work using independent judgment, they are supervisors and will be excluded. The fact that all of them exercise such authority does not mean that the analysis is flawed. The exclusion of nurses is no different.

6. What are the appropriate guidelines for determining the status of a person who supervises on some days, and works as a non-supervisory employee on other days?
7. What, if any, difference does it make that persons in a classification rotate into and out of supervisory positions, such that some or all persons in the classification will spend some time supervising?

The answers to Questions 6 and 7 are combined. Supervisory status turns on the existence of any power in Section 2(11), not the frequency of its exercise. See E&L Transp. Co. v. NLRB, 85 F.3d 1258 (7<sup>th</sup> Cir. 1996) (it is well-settled that if an individual is shown to exercise

supervisory authority, the frequency with which the individual exercises that authority does not impact the necessary conclusion that the individual is a statutory supervisor) If an employee regularly works in a supervisory capacity, then Section 2(11) is satisfied. U.S. Radium Corp., 122 NLRB 468 (1958). On the other hand, an individual who exercises only sporadic or irregular supervisory functions may not meet the statutory definition. Occasional, isolated instances of actions which might otherwise be indicative of supervisory authority are generally insufficient to confer supervisory status. See, e.g., Billows Elec. Supply, 311 NLRB 878 (1993); Commercial Fleet Wash, 190 NLRB 326 (1971).

The Board has stated that the proper test is whether a part-time supervisor spends a "regular and substantial" portion of his time performing supervisory duties. Aladdin Hotel, 270 NLRB 838 (1984). This test is workable.

Importantly, the Board needs to avoid over-reliance on job titles. In a long term care facility there are individuals who carry the title of "supervisor" or "charge nurse," while other "floor" nurses work along side nursing assistants, regularly assigning and responsibly directing work using independent judgment. Their responsible direction of work alone establishes their supervisory authority. This notion of "rotating into and out of supervisory positions" needs to be reviewed carefully so that titles do not cloud the issue. It is quite possible that an individual is always a statutory supervisor, but occasionally rotates into a position with greater supervisory authority.

8. To what extent, if any, may the Board interpret the statute to take into account more recent developments in management, such as giving rank and file employees greater autonomy and using self-regulating work teams?

If an employer is using a self-regulated work force where no one is exercising supervisory authorities within the meaning of Section 2(11) of the Act, then it is possible that

there are no supervisors. The Board does not need to make any wholesale changes to its traditional analysis to account for recent developments in management techniques. The Board should apply the statute to the facts of each case regardless of management techniques.

9. What functions or authority could distinguish between "straw bosses, lead men, set-up men, and other minor supervisory employees," Congress intended to include within the Act's protections, and "the supervisor vested with genuine management prerogatives"?

Question 9 relates directly to Questions 2, 3, and 4; in particular to Question 4, where the distinction between directing discrete tasks and directing other employees is discussed. A "straw boss", "lead man", or "set-up man" generally does not responsibly direct the work of other employees. He is responsible for performing a task. Incidental to performing his task, he may give some direction to other less skilled or experienced workers. However, he is not responsible for those workers' performance of their work. Furthermore, a straw boss generally does not use independent judgment. He simply passes along information about work assignments given to him by others. This is simply an application of the statutory definition to the facts before the Board. There is no separate category of "minor supervisors" or "major supervisors". Either an individual is a supervisor within the meaning of the Act or he is not.

10. To what extent, if at all, should the Board consider secondary indicia – for example, the ratio of alleged supervisors to unit employees or the amount of time spent by the alleged supervisors performing unit work – in determining supervisory status?

Secondary indicia, such as job descriptions; how subordinate employees view the relationship between themselves and the supervisors; attendance in management meetings; salary levels; and ratios are background factors that should be considered to help analyze evidence relating to Section 2(11) factors. They are particularly useful with apparent authority questions under Section 8 (a)(1) and 8 (a)(3). However, they cannot override the existence of Section



2(11) authority. For example, ratios may be helpful to analyze the actual authority a supervisor has to issue discipline or direct work. If there are five supervisors in a department for five employees, one might question whether all of the supervisors possess Section 2(11) authority. The analysis of Section 2(11) authorities in such a case may be more practical than it otherwise would have been. However, if the record supports a finding that each individual possesses supervisory authority, the ratio is not relevant.

Conversely, in the typical long term care facility with 60 or more nursing assistants, it is absurd to conclude (as the Board and Regional Directors are want to do), that a director of nurses and her assistant are the only supervisors. In fact, on nights and weekends, nurses are the highest ranking employees in a typical long term care facility. See Glenmark, 147 F.3d at 341 ("We cannot fathom the Board's position that for more than two-thirds of the week at a nursing home providing 24-hour care, where patient conditions can change on a moment's notice, there is no one present at the facility exercising independent judgment regarding proper staff levels and patient assignments."); GranCare, Inc., 137 F.3d at 376 (if nurses are not supervisors, the facility is without supervisory personnel almost half the time, which is "not a reasonable conclusion for a well-run nursing home").

Thus, secondary indicia are helpful tools to evaluate evidence, but they are not statutory indicia. The Board should continue to consider secondary indicia as part of its analysis of the overall situation.

### **III. CONCLUSION**

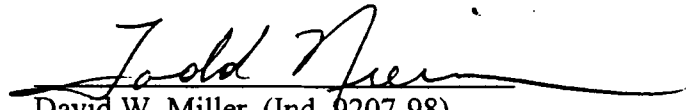
The Board should take this opportunity to end its long and inconsistent history of manipulating the definition of a supervisor in Section 2(11) of the Act. The courts have answered the questions posed by the Board. And, as those terms apply to the long term care

industry, the courts have held as a matter of law that nurses assign and responsibly direct the work of the nursing assistants, using independent judgment, in the interest of their employers. They are supervisors within the meaning of the Act. The Board should respect the plain language of the statute and the decisions of the reviewing courts. Failure by the Board to do so will continue the endless and costly litigation of this issue in the federal courts.

Respectfully submitted,

BAKER & DANIELS

By:

  
David W. Miller (Ind. 9207-98)  
Todd M. Niernan (Ind. 11273-49)

BAKER & DANIELS  
Suite 2700  
300 North Meridian Street  
Indianapolis, IN 46204  
317-237-0300

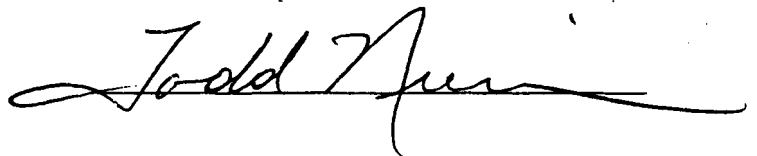
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served upon the  
below counsel of record by and/or party by first class, United States Mail, postage prepaid, this  
18th day of September 2003.

William C. Schaub, Jr.  
Regional Director, Region 7  
National Labor Relations Board  
300 Patrick V. McNamara Federal Bldg.  
477 Michigan Avenue  
Detroit, MI 48226-2569

Daniel W. Sherrick  
General Counsel  
International Union, UAW  
8000 East Jefferson Avenue  
Detroit, MI 48214

William M. Thacker  
Dykema Gossett, PLLC  
315 East Eisenhower Parkway  
Ann Arbor, MI 48108-3336

A handwritten signature in cursive script, appearing to read "Todd Auer", with a long horizontal flourish extending to the right.

## APPENDIX

**UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL BOARD RELATIONS BOARD**

<b>BEVERLY ENTERPRISES-MINNESOTA, INC.</b>	)	
<b>D/B/A GOLDEN CREST HEALTHCARE CENTER</b>	)	
	)	
<b>AND</b>	)	<b>CASE NOS. 18-RC-16415</b>
	)	
<b>UNITED STEEL WORKERS OF AMERICA,</b>	)	
<b>AFL-CIO/CLC,</b>	)	

**AFFIDAVIT OF MARY LOU RIPPIN**

In support of the Amicus brief filed by Kindred Healthcare Operating, Inc.,  
Mariner Health Care Management Company, and Extendicare Health Services, Inc., Mary Lou  
Rippin, being first sworn upon her oath states:

1. I have personal knowledge of the facts set forth in this Affidavit, and I am competent to testify as to such facts.
2. Presently, I am the DON at Extendicare's Arbors facility in Dayton, Ohio.  
As a DON, I have been in over all charge of the nursing departments in the facilities in which I have worked.
3. Residents in a long-term care facility differ in their health care needs, acuity levels, personalities, preferences, and mental awareness. No two residents are exactly the same, and any given resident's needs and acuity level can vary on a day-to-day, if not hourly basis. Likewise, all nursing assistants in a long-term care facility are not the same in terms of their experience, skill level, physical abilities, personalities, and behaviors.
4. The long-term care industry faces short staffing and high turn-over. As a result, on any given day, there is likely to be a newly hired nursing assistant being integrated

into the work force. Staff on a particular shift or floor in a long-term care facility is not the same day in and day out. Due to absences and new hires, the staff changes routinely.

5. Among other duties, a charge nurse (be it an LPN or RN) in a long-term care facility begins a shift by giving the nursing assistants assigned to her daily assignments concerning patient care and non-patient care duties. In order to do so, she must check her staffing to make sure that nursing assistants assigned to her area have reported to work. In making initial assignments, the nurse considers the needs of the residents; the experience, skills, and ability of the nursing assistants; and the resident and nursing assistant preferences. She must determine how many and which residents to assign to each nursing assistant.

6. During the course of the shift, the nurse makes rounds, checking residents' conditions and at all times monitoring the work of the nursing assistants assigned to her area.

7. The nurse is responsible and held accountable for making sure that the nursing assistants perform their work timely and correctly. She has the authority to reassign and redirect nursing assistants when she sees work that needs to be performed or redone. She counsels nursing assistants and trains them in the proper methods to perform work. The nurses are making a continual assessment of the nursing assistants' performance and progress, and the needs of the residents. She must understand the relative importance of the nursing assistants' tasks so she can properly determine which duties can be ignored when emergencies arise within the facility, and to prioritize duties.

8. Because residents' needs change on a regular basis, while the nurse is observing and reassessing residents, she implements changes to the care instructions and assignments on an on-going basis. To do so, she reassigns and redirects nursing assistants as needed. When doing so, she again takes into account the needs of the residents, the acuity level

of the residents, the preferences of the residents and employees, the experience and skill levels of the nursing assistants assigned to her area, the physical limitations of the nursing assistants, and the personalities of the individuals involved.

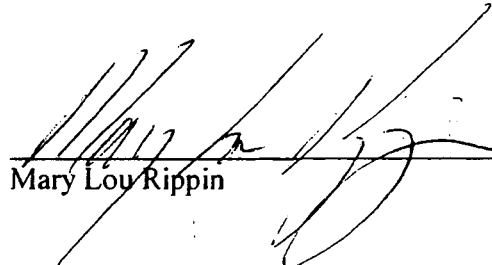
9. In every facility in which I have worked the nurse has the authority to assign and/or alter, delay or change lunch and rest breaks, according to the needs in her area. Her authority to adjust break times involves evaluating the work load, the residents' needs, and the extent to which the nursing assistants have completed their duties at the time a break is scheduled.

10. Patient care plans exist for each resident in a long-term care facility. However, a patient care plan does not detail a nursing assistant's duties. There is no document in a nursing home that sets out all of the details of a nursing assistant's tasks. A resident's care needs change by the day, if not by the minute. Care plans cannot contemplate such changes. The nursing assistant gets direction as to changes from the nurse in writing and verbally. The care plans do not tell a nurse how many residents to assign to a nursing assistant, or how to prioritize nursing assistant duties; nor do they anticipate changes in acuity level. It is up to the nurse to constantly assess and observe the residents, implementing changes to the needed care on an on-going basis. Those changes are reflected in the reassignment and redirection of the nursing assistants in the area. The care plan does not tell a nurse what, or how, to implement such changes. A care plan is a document intended to outline a resident's risk factors. It does not, and cannot, constrain a nurse's exercise of her judgment in providing nursing care.

11. At many times, including on weekends, evenings, and nights, the nurses are the highest authorities in a long-term care facility. As a DON, I expect the nurses reporting to me to use their judgment to assign and direct the work of the nursing assistants working with

them at all times. I have always held nurses responsible and accountable for the work of the nursing assistants reporting to them.

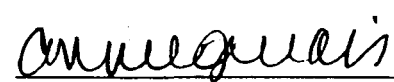
Further Affiant sayeth not.

  
Mary Lou Rippin

STATE OF OHIO                    )  
  ) SS:  
COUNTY OF Montgomery

Before me, a Notary Public in and for said county and state, personally appeared Mary Lou Rippin, who, being first duly sworn upon her oath, states that the facts alleged in the foregoing instrument are true to the best of her knowledge and belief. Signed and sealed this

16 day of September, 2003.

  
Connie J. Servais, Notary Public  
(Printed)

County of Residence: Montgomery

My Commission Expires:  
CONNIE J. SERVAIS, Notary Public  
In and for the State of Ohio  
My Commission Expires March 26, 2007



UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL BOARD RELATIONS BOARD

BEVERLY ENTERPRISES-MINNESOTA, INC. )  
D/B/A GOLDEN CREST HEALTHCARE CENTER )

AND )

UNITED STEEL WORKERS OF AMERICA, )  
AFL-CIO/CLC, )

CASE NOS. 18-RC-16415

AFFIDAVIT OF KATHY KENSER

In support of the amicus brief filed by Kindred Healthcare Operating, Inc.,  
Mariner Health Care Management Company, and Extendicare Health Services, Inc., Kathy  
Kenser, being first sworn upon her oath states:

1. I have personal knowledge of the facts set forth in this Affidavit, and I am competent to testify as to such facts.
2. Presently I am the director of nurses ("DON") at Extendicare's Puget Sound Health Care Center in Olympia, Washington.
3. Residents in a long-term care facility differ in their health care needs, acuity levels, personalities, preferences, and mental awareness. No two residents are exactly the same, and any given resident's needs and acuity level can vary on a day-to-day, if not hourly basis. Likewise, all nursing assistants in a long-term care facility are not the same in terms of their experience, skill level, physical abilities, personalities, and behaviors.
4. The long-term care industry faces short staffing and high turn-over. As a result, on any given day, there is likely to be a newly hired nursing assistant being integrated

into the work force. Staff on a particular shift or floor in a long-term care facility is not the same day in and day out. Due to absences and new hires, the staff changes routinely.

5. During the course of the shift, the nurse makes rounds, checking residents' conditions and at all times monitoring the work of the nursing assistants assigned to her area.

6. The nurse is responsible and held accountable for making sure that the nursing assistants perform their work timely and correctly. She has the authority to reassign and redirect nursing assistants when she sees work that needs to be performed or redone. She counsels nursing assistants and trains them in the proper methods to perform work. The nurses are making a continual assessment of the nursing assistants' performance and progress, and the needs of the residents. She must understand the relative importance of the nursing assistants' tasks so she can properly determine which duties can be ignored when emergencies arise within the facility, and to prioritize duties.

7. Because residents' needs change on a regular basis, while the nurse is observing and reassessing residents, she implements changes to the care instructions and assignments on an on-going basis. To do so, she reassigns and redirects nursing assistants as needed. When doing so, she again takes into account the needs of the residents, the acuity level of the residents, the preferences of the residents and employees, the experience and skill levels of the nursing assistants assigned to her area, the physical limitations of the nursing assistants, and the personalities of the individuals involved.

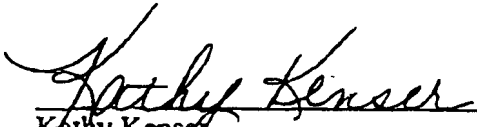
8. In every facility in which I have worked the nurse has the authority to assign and/or alter, delay or change lunch and rest breaks, according to the needs in her area. Her authority to adjust break times involves evaluating the work load, the residents' needs, and

the extent to which the nursing assistants have completed their duties at the time a break is scheduled.

9. Patient care plans exist for each resident in a long-term care facility. However, a patient care plan does not detail a nursing assistant's duties. There is no document in a nursing home that sets out all of the details of a nursing assistant's tasks. A resident's care needs change by the day, if not by the minute. Care plans cannot contemplate such changes. The nursing assistant gets direction as to changes from the nurse in writing and verbally. The care plans do not tell a nurse how many residents to assign to a nursing assistant, or how to prioritize nursing assistant duties; nor do they anticipate changes in acuity level. It is up to the nurse to constantly assess and observe the residents, implementing changes to the needed care on an on-going basis. Those changes are reflected in the reassignment and redirection of the nursing assistants in the area. The care plan does not tell a nurse what, or how, to implement such changes. A care plan is a document intended to outline a resident's risk factors. It does not, and cannot, constrain a nurse's exercise of her judgment in providing nursing care.

10. At many times, including on weekends, evenings, and nights, the nurses are the highest authorities in a long-term care facility. As a DON, I expect the nurses reporting to me to use their judgment to assign and direct the work of the nursing assistants working with them at all times. I have always held nurses responsible and accountable for the work of the nursing assistants reporting to them.

Further Affiant sayeth not.

  
Kathy Kensey

COUNTY OF Lewis ) SS:

Before me, a Notary Public in and for said county and state, personally appeared Kathy Kenser, who, being first duly sworn upon her oath, states that the facts alleged in the foregoing instrument are true to the best of her knowledge and belief. Signed and sealed this

17 day of Sept., 2003.



My Commission Expires:

6-19-06

Joann F. Koenig  
Joann F. Koenig, Notary Public  
(Printed)

County of Residence: Deer

**UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL BOARD RELATIONS BOARD**

**BEVERLY ENTERPRISES-MINNESOTA, INC. )  
D/B/A GOLDEN CREST HEALTHCARE CENTER )**

**AND )**

**UNITED STEEL WORKERS OF AMERICA, )  
AFL-CIO/CLC, )**

**CASE NOS. 18-RC-16415**

**AFFIDAVIT OF ARLENE GALLO**

In support of the Amicus brief filed by Kindred Healthcare Operating, Inc.,  
Mariner Health Care Management Company, and Extendicare Health Services, Inc., Arlene  
Gallo, being first sworn upon her oath states:

1. I have personal knowledge of the facts set forth in this Affidavit, and I am competent to testify as to such facts.
2. Presently I am the director of nurses ("DON") at Kindred Blue Hills Alzheimer's Center in Stoughton, Massachusetts.
3. Residents in a long-term care facility differ in their health care needs, acuity levels, personalities, preferences, and mental awareness. No two residents are exactly the same, and any given resident's needs and acuity level can vary on a day-to-day, if not hourly basis. Likewise, all nursing assistants in a long-term care facility are not the same in terms of their experience, skill level, physical abilities, personalities, and behaviors.
4. The long-term care industry faces short staffing and high turn-over. As a result, on any given day, there is likely to be a newly hired nursing assistant being integrated into the work force. Staff on a particular shift or floor in a long-term care facility is not the same day in and day out. Due to absences and new hires, the staff changes routinely.

5. Among other duties, a charge nurse (be it an LPN or RN) in a long-term care facility begins a shift by giving the nursing assistants assigned to her daily assignments concerning patient care and non-patient care duties. In order to do so, she much check her staffing to make sure that nursing assistants assigned to her area have reported to work. In making initial assignments, the nurse considers the needs of the residents; the experience, skills, and ability of the nursing assistants; and the resident and nursing assistant preferences. She must determine how many and which residents to assign to each nursing assistant.

6. During the course of the shift, the nurse makes rounds, checking residents' conditions and at all times monitoring the work of the nursing assistants assigned to her area.

7. The nurse is responsible and held accountable for making sure that the nursing assistants perform their work timely and correctly. She has the authority to reassign and redirect nursing assistants when she sees work that needs to be performed or redone. She counsels nursing assistants and trains them in the proper methods to perform work. The nurses are making a continual assessment of the nursing assistants' performance and progress, and the needs of the residents. She must understand the relative importance of the nursing assistants' tasks so she can properly determine which duties can be ignored when emergencies arise within the facility, and to prioritize duties.

8. Because residents' needs change on a regular basis, while the nurse is observing and reassessing residents, she implements changes to the care instructions and assignments on an on-going basis. To do so, she rcassigns and redirects nursing assistants as needed. When doing so, she again takes into account the needs of the residents, the acuity level of the residents, the preferences of the residents and employees, the experience and skill levels

of the nursing assistants assigned to her area, the physical limitations of the nursing assistants, and the personalities of the individuals involved.

9. In every facility in which I have worked the nurse has the authority to assign and/or alter, delay or change lunch and rest breaks, according to the needs in her area. Her authority to adjust break times involves evaluating the work load, the residents' needs, and the extent to which the nursing assistants have completed their duties at the time a break is scheduled.

10. Patient care plans exist for each resident in a long-term care facility. However, a patient care plan does not detail a nursing assistant's duties. There is no document in a nursing home that sets out all of the details of a nursing assistant's tasks. A resident's care needs change by the day, if not by the minute. Care plans cannot contemplate such changes. The nursing assistant gets direction as to changes from the nurse in writing and verbally. The care plans do not tell a nurse how many residents to assign to a nursing assistant, or how to prioritize nursing assistant duties; nor do they anticipate changes in acuity level. It is up to the nurse to constantly assess and observe the residents, implementing changes to the needed care on an on-going basis. Those changes are reflected in the reassignment and redirection of the nursing assistants in the area. The care plan does not tell a nurse what, or how, to implement such changes. A care plan is a document intended to outline a resident's risk factors. It does not, and cannot, constrain a nurse's exercise of her judgment in providing nursing care.

11. At many times, including on weekends, evenings, and nights, the nurses are the highest authorities in a long-term care facility. As a DON, I expect the nurses reporting to me to use their judgment to assign and direct the work of the nursing assistants working with

them at all times. I have always held nurses responsible and accountable for the work of the nursing assistants reporting to them.

Further Affiant sayeth not.

Arlene Gallo RN MS  
Arlene Gallo

STATE OF MASSACHUSETTS )  
COUNTY OF NORFOLK ) SS:

Before me, a Notary Public in and for said county and state, personally appeared Arlene Gallo, who, being first duly sworn upon her oath, states that the facts alleged in the foregoing instrument are true to the best of her knowledge and belief. Signed and sealed this

16th day of SEPTEMBER, 2003.

Patricia A Campbell  
PATRICIA CAMPBELL, Notary Public  
(Printed)

County of Residence: NORFOLK

My Commission Expires:

~~MY COMMISSION EXPIRES~~  
FEB. 20, 2009



